No. 96-8422

In The

Supreme Court of the United States

October Term, 1997

SILLASSE BRYAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

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I

PETITIONER'S CONVICTION FOR WILLFULLY VIOLATING THE FEDERAL FIREARMS DEALER STATUTE REQUIRES PROOF OF KNOWLEDGE OF THE LICENSING REQUIREMENT

Using methods like those of the ancient alchemist, the Government's brief attempts to engage in a form of legislative transmutation to distill an acceptable meaning to Section 924(a)(1)(D)'s "willful" scienter requirement which appears on the surface to be more burdensome than "knowing," but in reality requires less than proof of knowledge of licensure. Its attempt is simultaneously legally transparent and logically unconvincing.

A. The Government's Standard

The Government (Br. p.11, fn.2) seeks to distinguish cases such as *United States v. Obiechie*, 38 F.2d 309, 315 (7th Cir. 1994) in which, as Judge Rovner's opinion reveals, the Government has failed to convincingly argue[1] any basis for distinguishing between "knowing" and "willfully":

> The Government could only suggest that the term willfully may require actual knowledge of the facts constituting the offense, whereas knowingly would include, as well, the ostrich defendant who deliberately disregards, or consciously avoids those facts.

The unanimous Seventh Circuit opinion unequivocally held:

> In our view, the only reasonable distinction between Section 924(a)(1)(D)'s knowing and willfully standards is that the latter requires knowledge of the law.

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[1] In *United States v. Rodriguez*, 132 F.3d 208, 211 (5th Cir. 1997), Judge Higginbotham's opinion recites that the Government conceded that knowledge of the law is the correct legal standard. That is, indeed, the law, and the Government knows it.

Respondent suggests (Br. 14) that willful behavior can include not only knowledge that one's conduct was unlawful, but also, conduct amounting to a "reckless disregard" of the requisite licensing standard – a position which in 1994 the Government told the Court was the lesser standard of "knowing" conduct. Now, the Government (Br. 16) says a defendant may be convicted under Section 924(a)(1)(D) who acted, merely "recklessly."[2]

To serve this end, the Government suggests that it can "live with" an interpretation of "willfully," which merely requires proof that the Defendant acted with a *general knowledge* that his conduct was unlawful. This standard apparently achieves the goal of implying that this scienter's level is more severe than "knowing," and somehow operates as a form of legislative "spin control" to limit "willfully." We strongly disagree.

The apparent source for the suggested "general knowledge of illegality"[3] standard stems from *United States v. Collins*, 957 F.2d 72 (2d Cir.), *cert. den.*, 504 U.S. 944 (1992). Thus, Judge Boudin's opinion in *United States v. Andrade*, ___ F.3d ___, 1998 WL 32345 (1st Cir. 1998) was foreshadowed by, and is a further extension of his opinion for the Court in *United States v. Hurley*, 63 F.3d 1, 16 (1st Cir. 1995), *cert. den.*, 517 U.S. 1105 (1996), where in focusing upon the co-defendants Saccoccio, who were charged in a racketeering conspiracy, *inter alia*, to launder drug proceeds, the Court opined that generalized knowledge was sufficient to convict.

Judge Boudin's "generalized knowledge of illegality," standard not merely undercut his own Court's prior *en banc*

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[2] This in contrast to a standard of "conscious avoidance" where efforts to affirmatively not know, exist (*see United States v. Jewell*, 532 F.2d 697 (7th Cir.), *cert. den.*, 426 U.S. 451 (1976)).

[3] In *Collins*, *supra*, the defendant failed to object to the omission of a willfulness jury instruction. As such, *Collins* was, in reality, a distinguishable plain error case (he claimed entrapment), which was affirmed by the Court of Appeals, on a harmless error basis. Judge Altimari's discussion of willfulness was, accordingly, pure dictum.

opinion in *United States v. Aversa*, 984 F.2d 493, 499-500 (1st Cir. 1993) but was advanced against evidence that Kenneth Saccoccio admitted on tape that he knew laundering was illegal. Thus, the objection, "even if they do not know the *precise* requirements of the law" *Hurley*, *supra* p. 16, is belied by the facts, (but cf. *United States v. Vasquez*, 53 F.3d 1216, 1225-1226 (11th Cir. 1995)) (rejecting Government's suggested adoption, post-*Ratziaf*, of a "generalized knowledge" standard); accord *United States v. Rodriguez*, 132 F.3d 208, 213 (5th Cir. 1997) (per Higginbotham, J.).

The Government misstates the meaning of "willfully," and misleadingly claims that only those able to cite statutory "chapter and verse" can be convicted. Finally, in a supposed *coup de grace* demonstrating what knowledge of licensure constitutes, Judge Boudin strikes down this "strawman" argument:

> To impose such a requirement of detailed knowledge of the firearms statute (to which few judges could pretend) would make an enforcement of the gun dealer laws very difficult.
> (*United States v. Andrade*, *supra* p.4)

The resort to linguistic distortion, and the erection of a strawman argument that Petitioner seeks to require the Government to prove detailed statutory knowledge is a thinly veiled smoke screen to distract from the deficient language in jury charges which clearly stated that knowledge of licensure was *not* an element of the crime. Presumably, the jury followed these instructions. Thus, "general knowledge" is a clever lawyer's invention – but enjoys no endorsement from the Congress, or actual case support. As such, it should be rejected as an artificial device intended to secure in the courthouse well what could not be achieved on the Capitol floor.

The Government contends that its diminished view of "willfully" is applicable because the Solicitor General views all guns as "inherently dangerous." However, Congress did not voice such a view, being disinclined to even enter the field of gun regulation until well after the mid-point of the twentieth century.

Thus, the Government's view was rejected in *Staples v. United States*, 511 U.S. 600 (1994) (absent proof defendant knew weapon possessed automatic firing capability, conviction improper) and *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (firearm components sold in kit form not an assembled firearm for tax purposes) (26 U.S.C. § 5821). The Court has refused to make a judicial finding that firearms are *per se* highly dangerous as compared to, for instance, such dangerous instruments as hand grenades (*United States v. Freed*, 401 U.S. 601 (1971) or silencers (*e.g., United States v. Endicott*, 803 F.2d 506, 508-509 (9th Cir. 1986); *United States v. Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984)).

This Court has squarely rejected labeling firearms inherently dangerous whenever the Government sought to have this view judicially sanctioned – a posture clearly respectful of Congressional determination that to do so would criminalize a wide range of apparently, and reasonably perceived, innocent citizen conduct. In this case, the weapons were obtained in Ohio, where a firearms permit is not even required – only a photo identification. The Government fails to explain how even a generalized knowledge of dealer licensure exists.

Thus, to cite, as the Government does, *United States v. Balint*, 258 U.S. 250, 253 (1922), is both an unwarranted and disturbing attempt to analogize firearms to "narcotics." *Balint's* application of the Anti-Narcotic Act of 1914 must be viewed against an explicit Congressional intent, as Chief Justice Taft wrote, to combat the spread of drugs. The drug statute drafters declined to protect sellers or buyers who professed to be innocent purchasers of strictly controlled substances universally accepted as potentially deadly.

In the case at bar, the drafters of the Firearms Owners Protection Act (FOPA), were not merely prompted by such concerns, they clearly acted upon them. Thus, *Balint* should be properly confined to inherently dangerous substances, the mere possession of which is *malum prohibitum*. Such cannot be said about firearms that have enjoyed presumptive constitutional protection, since the adoption of the Second Amendment back in 1791.

B. The Language Employed

The Government's standard cannot be applied in the face of statutory language which clearly penalizes only a person who:

> willfully violates any other provision of *this chapter*. (emphasis supplied)

This language, coupling the *mens rea* standard of "willfully" to the provisions of *this chapter*, is clearly analogous to the language of 31 U.S.C. § 5322(a), upon which *Ratzlaf* ruled, which penalized any:

> person willfully violating *this subchapter*. . . . (emphasis supplied)

Where the identified mental state is congressionally linked to statutorily enumerated "Provisions," "Chapter," or "Section," it clearly requires knowledge of the Provisions, Chapter, or Section, and not something different or less. Had Congress intended a mere generalized state of knowledge, it presumably would have penalized those who knowingly or willfully engage in specified *acts* – or *conduct*. It did not do so, and the distinction, this Court has noted, is critical (see *Kawaauhau v. Geiger*, ___ U.S. ___, slip opn. p.4 (3/3/98)).

Thus, the draftsmanship employed herein is similar to that followed in *Ratzlaf v. United States*, 510 U.S. 135 (1994) and *Liparota v. United States*, 471 U.S. 419 (1985), i.e., the adverb "willfully" modifies the statute, rule or regulation and not merely the enumerated factual conduct or behavior. The Government's suggested view is antithetical to this Court's accepted and articulated notions of statutory construction, and, inflicts unwarranted violence to the positive jurisprudential benefits of *stare decisis*. This Court should reject the "siren song" of such a subjective *ad hoc* approach. At the very least this language should trigger the rule of lenity, as it did in both *Ratzlaf* and *Liparata*.

C. "Willfully" Has the Same Meaning in Both Section 924 and Section 923

Petitioner argues that when FOPA was adopted, "willfully" already enjoyed a settled meaning under Sec. 923, and Congress intended that same meaning to apply when it added the "willfully" standard to Sec. 924 (Br. at 14-15). The Government responds that the willfully standard of Section 923 is inapplicable here because it is derived from civil cases, its meaning is indefinite, and there is allegedly "no suggestion in FOPA's extensive legislative history that Congress intended to adopt any of the varying definitions of 'willfully' articulated in the . . . cases that had defined the term . . . under Sec. 923." (Govt. Br. at 28-29).

This approach amounts to an argument that "willfully" as used in Section 923 has a different meaning from the same word when it is used in Section 924. This violates a basic canon of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143. Certainly the same word should not be interpreted differently in adjoining sections of a law absent clear indication that a contrary meaning was intended. This is especially true here since the anomalous result would be that the *mens rea* standard would be higher in a civil license revocation case than in a criminal prosecution.

Far from being silent on this point, as the Solicitor General contends, the legislative history reveals that the identical meaning of "willfully" was intended for both civil and criminal cases under Sections 923 and 924.

Senate Report 98-583,[4] reflects the Committee's intent to apply the willfully standard used in *Rich v. United States*, 383 F. Supp. 797, 800-01 (S.D. Ohio 1974) to civil cases. S. Rep. 98-583 at 14 & n.30. *Rich* holds that the correct standard under Sec. 923 is the "criminal" standard, and that "willfully"

[4] Although this Report is from a prior Congress, the Government relies on it as authoritative elsewhere in its brief (Br. at 35-38, 43-44).

means that the licensee "shall have purposefully or intentionally failed to obey the statute[.]" *Rich* at 800.[5]

The nexus between Sec. 923 and Sec. 924 is also demonstrable in the 1983 Senate Hearings. In response to written questions from Senator Kennedy, the Treasury Department observed both that a willful violation was already required for license revocations, and that the Administration did not believe that the addition of this element in criminal cases would be an impediment to successful prosecutions. Hearing on S.914 (98th Cong., 1st sess., 1983) at pp. 58-59 (questions h and i).

Accordingly, both basic rules of statutory construction, and FOPA's legislative history make clear that "willfully" bears the same meaning in Section 924 that it has in Section 923. This is the meaning Petitioner advocates.

D. The Presumption of Knowledge of State Laws in Section 922(b)(3) Supports Petitioner's Definition of Willfully

FOPA added a presumption to the firearms law that licensees who make permitted sales to customers residing in another state are "presumed . . . to have . . . actual knowledge of the State laws and published ordinances of both States." 18 U.S.C. § 922(b)(3). Although only a willful violation of the interstate sales provision is punishable civilly (Section 923) or criminally (Section 924), the Government argues that adoption of this presumption is not a sign that Congress intended a willful violation to reach only those who know the law, and intend to violate it (Gov. Br. at 27-28).

[5] The Report also cites *Shyda v. Director, BATF*, 448 F. Supp. 409, 415 (M.D. Pa. 1977) (BATF must prove that licensee "knew of his legal obligation and purposefully disregarded or was plainly indifferent to" it); and *Mayesh v. Schultz*, 58 F.R.D. 537, 539-40 (S.D. Ill. 1973) (willful violation found where licensee acknowledged he knew the law and proceeded to violate it).

It is established law that a "willful" violation for the purpose of license revocation requires the licensee's awareness of the relevant law. Thus, in the civil context, Congress was clearly presuming knowledge of State law in order to facilitate licensee discipline for those who make improper interstate sales. Congress could scarcely have believed and intended to use a different and lesser standard of "willfully" that would make a criminal conviction easier to obtain than a license revocation.

E. The Cases Cited By Respondent Do Not Support Its Interpretation of FOPA

In support of its Alice in Wonderland "Queen of Hearts" view of the meaning of "willfully," Respondent cites (Br. 15) to this Court's holding in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219 (1997).

In *Lanier*, this Court reviewed the Sixth Circuit's reversal of the conviction of a Tennessee Judge who sexually assaulted women when not ruling on family law matters. The question was whether Lanier, a veteran local Judge, could be convicted of violating a federal post-Civil War reconstruction civil rights statute in the absence of a Supreme Court holding on facts (unwanted sexual advances) "fundamentally similar" to those alleged in *Lanier*.

The issue was not whether Lanier acted "willfully," but rather, whether 18 U.S.C. § 242 applied to non-consensual sexual misconduct. This Court held that when a Judge's chambers is converted into a bordello, the Courts should not impose statutory glosses (as did the Sixth Circuit) to heighten the burden of proof.

Additionally, puzzling reference is made at page 18 of the Government's brief to this Court's holding in *Bates v. United States*, ___ U.S. ___, 118 S.Ct. 285, 290, n.6 (1997).

In *Bates*, this Court reviewed an order of the Seventh Circuit reversing dismissal of an indictment charging the defendant with misapplying student loan funds in violation of 20 U.S.C. § 1070 *et seq.*

As Justice Ginsburg's opinion made clear, the statute in question (20 U.S.C. § 1097(a)) was *prima facie* violated when Bates knowingly and willfully misapplied the insured student loan funds. Congress did not impose an *intent to defraud* scienter requirement, whereas companion Sec. 1097(d) did. Mindful of the absence of an "intent to defraud" requirement in cases brought under Sec. 1097(a), the Court unanimously declined to impose one where Congress had not.

Bates simply reaffirms that where, as here, statutory subsections employ varying mental states, accepted rules of statutory application require the Court to employ the more rigorous standard where applicable, and to refrain from engaging in legislative redraftsmanship where Congressional intent is clear. Since Congress clearly applied *willfully* to Petitioner's conduct, the suggestion that applying a concocted Justice Department standard closer to *knowingly* is the very essence of self-serving interpretation which *Bates* found inappropriate.

We think it fair to say, and a reading of page 21 of the Government's brief is not inconsistent with the view, that the legislative initiatives which led to FOPA's enactment sought not surprisingly, as the title announces, to *protect* firearms owners and users from fear of potential federal prosecution (*cf. United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (construing "Clean Water Act" broadly as an ameliorative statute to prohibit discharge of pollutants into "navigable waters")). Thus, the Government grudgingly recognizes that the use of "willfully" in 924(a)(1)(D) was intended to simultaneously distinguish, and heighten, the Government's required evidentiary proof. Burden of proof enhancement was intended, and achieved notwithstanding objection by the Bureau of Alcohol, Tobacco and Firearms.

The logical import of requiring proof of *knowledge* that one's conduct is unlawful in a Sec. 922(a)(1)(A) prosecution, must of necessity mean knowledge that a dealer's license is required. It is that status of licenses upon which lawfulness hinges; no other issue or intent is either relevant, or required.

It is, we respectfully submit, not the proper role for judges to sit as "roving commissions," rounding off, or eliminating perceived difficulties of proof imposed by the legislative branch. Were this proper,[6] then, perhaps, such landmark holdings or *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Brown v. Board of Education*, 349 U.S. 294 (1955) could be viewed as wrongly decided, not because they were somehow constitutionally infirm, but because some Judges felt that confessions would be harder for police to elicit, and others believed that desegregation required bussing too costly to taxpayers, and nettlesome for local schoolboards to implement. Such views, are not merely constitutionally unacceptable, they are symptomatic of an impotent view of constitutional law which seeks to help the sovereign simply because it protests that constitutional compliance is too taxing.

What is required is proof, direct or circumstantial, that a defendant knew he needed a license, not knowledge of the specific law, section, paragraph, or regulation where licensure is found. The jury charges in *Bryan*, and *Andrade* fail constitutional muster because the Government was relieved of proving an element of the crime – willful violation of required licensure.

F. The Legislative History Supports Petitioner's Interpretation of the Statute

The Government agrees with Petitioner that resort to legislative history is not needed to resolve this case. Nevertheless, in the legislative history section of its brief (pp. 34-45), the Government argues that the proper definition of willfully in 18 U.S.C. § 924(a)(1)(D) is that "the offender has actual cognizance of the facts necessary to constitute the offense, but not necessarily knowledge of the law," a standard it finds in a Senate Report from a prior Congress. It is important to note that this standard, which does not require

[6] The Fifth Circuit perceived no such problem in *United States v. Rodriguez*, *supra*, in affirming the conviction.

awareness one is acting unlawfully, is not the same definition of willfully that the Government advocates in the remainder of its brief, *i.e.*, the standard requiring "proof that the defendant was generally aware that his conduct was unlawful." (Br. at 8). Thus the Government appears to concede at the outset that the standard it advocates in the rest of its brief lacks legislative support in FOPA's history.

There is no Senate report on FOPA in the 99th Congress, and the Senate Reports in prior Congresses appear to vacillate as to willfully's meaning. In addition, the predecessor Report relied on by the Government is so self-contradictory that the leading FOPA commentator rationalizes that drafters mistakenly used "willfully" when they meant "knowingly." David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 648-51 (1987).

The House of Representatives Committee Report on FOPA in the 99th Congress, stated clearly that the "violation of a known legal duty" standard was intended. Most of the floor debate agrees, although there is one contrary colloquy. Mindful of the size, diversity and political differences which routinely prevail, such lack of unanimity is neither surprising, nor disabling. On balance, the weight of the legislative history favors the "known legal duty" definition of "willfully."

1. The House of Representatives

As is detailed in petitioner's brief, House Report No. 99-495 is the only committee report on the FOPA legislation in the 99th Congress. Pet. Br. at 17-20; *see* Hardy, *supra* at 588. As the only committee report that accompanied any version of FOPA proposed in that Congress, the House Report contains the only explanation of the meaning of "willfully" that members had before them when the proposed law was considered.

The House Report is clear that the willfulness requirement means that a conviction for unlicensed gun sales requires proof of the defendant's "knowledge that such conduct requires a federal license, and a determination to violate that law." House Report No. 99-495 at 11. During the House

debate concerning the "willfully" standard, Rep. Hughes, Chair of the Subcommittee on Crime and floor manager of H.R. 4332, confirmed that the "willfully" standard requires the prosecution to prove "that the dealer was personally aware of . . . the law, and that he made a conscious decision to violate the law." 132 Cong. Rec. H1684 (daily ed. April 9, 1986) (statement of Rep. Hughes).

The House retained this "willfully" standard in its version of FOPA. As Hardy notes, the final House bill combined the Judiciary Committee's bill (H.R.4332), the bill that had passed the Senate (S.49) and the original Volkmer substitute (H.R.945). Hardy, *supra* at 625.[7] As one member noted, the bill was not S.49 nor the original Volkmer bill. 132 Cong. Rec. H1657 (daily ed. April 9, 1986) (statement of Rep. Smith). The House bill passed the Senate intact, without a conference. Hardy, *supra* at 625. Therefore, because the House Report is the only committee report on FOPA in the 99th Congress, and because the House bill ultimately became law, the House Report is the authoritative committee FOPA report.[8]

The Government's argument that the House legislative history favors its position is based on a brief colloquy between Representatives McCollum and Volkmer (Gov. Br. at 41-42, 44). However, this single colloquy cannot outweigh the consistent House Report and contrary floor debate (*see Brock v. Pierce County*, 476 U.S. 253, 263 (1986)). The comments of a single member, even a sponsor, are outweighed by the statutory language and structure (*Posters n' Things v. United States*, 511 U.S. 513, 522 n. 12 (1994)). This single exchange

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[7] Changes made on the floor of the House included two amendments sponsored by Rep. Hughes, a prohibition on the sale or possession of machine guns (132 Cong. Rec. 7085), and a prohibition on the interstate sale of handguns (132 Cong. Rec. H1704 (daily ed. April 9, 1986)).

[8] Thus, the Government's claim that the U.S. Code Cong. & Admin. News "incorrectly" chose the House Report as the pertinent committee report is itself mistaken (*see* Gov. Br. at 39 n.16).

on the floor cannot bear the weight the Government places on it.

2. The Senate

There is no Senate Report on S.49, the version of FOPA which first passed the Senate in the 99th Congress. The Senate Report on a predecessor bill, S.1030, opines that a willful violation is one "intentionally undertaken in violation of a known legal duty." S. Rep. 97-476 at 22. While Senate Report 98-583 (on S.914, another predecessor version) contains language that appears to say otherwise, that language is severely contradicted by other portions of the same Report.

There is no Senate Report on S.49 because it was not sent to Committee. This occurred because, after the majority leader refused to bring FOPA to the floor in the 98th Congress, its sponsors agreed to drop an effort to attach it as an appropriations rider only after they extracted a promise that their bill would not be relegated to Committee in the next Congress, but would remain on the floor for a vote. Hardy, *supra* at 611-12.

Nevertheless, the Government now contends that Senate Report 98-583 should somehow be deemed the Committee Report on a bill in the next Congress (Br. at 35-38, 43-44). This contention rests on a single phrase in a speech by Senator Hatch (italicized below), that, we respectfully submit, has been wrenched out of context (Br. at 38).

When read in context, it is clear that Senator Hatch believed that S. Rep. 98-583 was the source of legislative intent for only one provision of FOPA. In support of his amendment to delete from S.49 a provision at the end of Section 924(a) that read, "Provided, that no person shall be prosecuted under this subsection where the conduct of such person involves simple carelessness," Sen. Hatch argued:

> Madam President, during negotiations in the 98th Congress relative to the scienter or state of mind requirements, there was a discrepancy between what the parties understood the term "knowing" to mean. Senator McClure . . .

expressed his concern that some courts have diluted "knowing" to mean "belief" or "reckless disregard" rather than "actual cognizance." The simple carelessness language was added to the bill to clarify that the holding and rationale of those cases would not apply to the offenses covered by this bill. Unfortunately, attempting to set aside those cases by the addition of the simple carelessness language creates needless confusion and contradictions in S. 49. Accordingly, this objective is more properly handled by *the legislative history of the report to accompany S. 914 from the 98th Congress, which is the authoritative source for the intent of the Judiciary Committee*, and the clear understanding of the manager and supporters of this bill that these cases are not to be applied as a guide in ascertaining the meaning of the term "knowingly." . . . [W]e intend to exclude the following cases from any consideration of the meaning of the term "knowingly": [lists cases]

* * *

> The ambiguity and confusion inherent in the term "simple carelessness" might only be partially overcome by extensive legislative history explaining the narrow purpose of this terminology. It seems far preferable to devote that legislative history to Congress' intent that the cases I have mentioned above not be applied to offenses occurring under this act.

131 Cong. Rec. S9131-32 (daily ed. July 9, 1985) (emphasis added).

It is clear that Senator Hatch utilized the Senate Report on S.914 to explain why the "simple carelessness" provision should be deleted, and to elucidate one aspect of "knowing" in S.49. His was not a general statement that the Report from the prior Congress should be incorporated by reference as the Report on S.49. Nor is there any evidence that Senators participating in this debate understood that the prior Report,

which they probably never saw, and which concerned a bill that did not reach the floor, was the current bill's Report.

Consequently, the Government's reliance on the statement from Senate Report 98-583 (at p.20), that willful conduct includes "situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily knowledge of the law," is no more the authoritative legislative history of S.49 in the 99th Congress than is the statement in Senate Report 97-476 (at p.22) that "willful violations [are] those intentionally undertaken in violation of a known legal duty."[9]

Moreover, the statement in Senate Report 98-583 may be nothing more than an inadvertent error by the drafter of the Report in writing "willfully" when what was meant was "knowingly." That is the position taken by David Hardy, the statute's recognized preeminent authority. *See, e.g., United States v. Hayden*, 64 F.3d 126, 129 (3rd Cir. 1995); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (*en banc*); *United States v. Obiechie*, 38 F.3d at 312.

What was new in the 98th Congress' version of FOPA was the application of a "knowingly" standard to some violations, instead of applying "willfully" to them all (*see* Gov. Br. at 37). That is what is being explained in both the paragraph cited by the Government and the following paragraphs. Thus, it is probable that at this point the Report intended to define "knowing," not "willful." Hardy, *supra* at 648-49 & n.347.

In addition, the Report's definition, that a defendant must have "actual cognizance of the facts necessary to constitute the offense, but not necessarily knowledge of the law," defines a "knowing" *mens rea*, not a "willful" one. *See Staples v. United States*, 114 S.Ct. at 1797-98 ("knowing" *mens rea* means that defendant must "know the facts that make his conduct illegal"). If this was how the committee attempted to

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[9] And, as noted above, the standard in Senate Report 98-583 is not the Second Circuit's *Collins* standard that the Government has been advocating in this appeal. The *Collins* standard is found nowhere in the legislative history.

define "willfully," it is difficult to imagine what was intended to define the lesser standard of "knowing" in Sec. 924(a)(1). Nor is there any mention in the Report of an intent to alter the definition of willful that was used by the Committee in the prior Congress (*see Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988)).

Additional support for Hardy's position is found in Senator Hatch's reference to the Senate Report that is quoted at length above. He states that his purpose is to make clear that the correct definition of "knowing" is the "actual cognizance" standard in S. Rep. 98-583. However, "knowing" is not defined in that Senate Report. The only Report definition is that "willfully" involves actual cognizance of the facts. Senator Hatch apparently thought, as Hardy powerfully surmises, that the Senate Report attempted to define "knowing," not "willful."

Senate Report 98-583 recites that the Committee's decision regarding the use of "willfully" was influenced by concerns expressed by the Administration at the Hearings on S.914. Those Hearings make plain that the sole Administration sought changes concerned the number of violations to which the willfully standard would apply. The hearings support petitioner's view of the meaning of "willfully." For example, the Report cites to p.22 of the Hearings. S. Rep. 98-583 at 20 n.44. Turning to that page, we find a chart stating that "Willfulness, *i.e., knowledge of the requirements of the law*" was "not an element of proof" for a violation of the Gun Control Act under present law, but would be required for certain prosecutions under the bill the Committee was reporting out. Hearing on S.914 (98th Cong., 1st sess., 1983) at 22 (emphasis added).

The Treasury Department agreed with this position. Its response to written questions from Senators also supports Petitioner's view. *See, e.g.*, answer to question 5 submitted by Sen. Thurmond, Hearings at p. 48 ("in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal Law" he wouldn't violate the provisions that require willfulness); answer to questions h and i submitted by Sen. Kennedy at pp. 58-59 (a willful violation is

already required for license revocation, and will not be an impediment to successful prosecutions).

In sum, the weight of the legislative history supports Petitioner's definition of "willfully," although that history, as with many legislative initiatives, is not free from confusion and contradiction. However, when such is found, the application of the rule of lenity[10] (Petitioner's Br. p. 26) becomes operational.

II

THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT THE GOVERNMENT MUST PROVE THE PETITIONER'S KNOWLEDGE OF HIS OBLIGATION TO POSSESS A FEDERAL FIREARMS DEALERS LICENSE DIMINISHED THE GOVERNMENT'S BURDEN OF PROOF AND DEPRIVED PETITIONER OF A FAIR TRIAL

At page 46 of its brief, the Government contends that the jury charge delivered by Judge Trager was legally accurate. It does so even as it is forced to acknowledge Judge Trager's admonition:

> [T]he Government is not required to prove that [Petitioner] knew that a license was required, nor is the Government required to prove that he had knowledge that he was breaking the law (JA. 18-19).

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[10] The Government's attempt to eviscerate the applicability of the rule of lenity is without merit and its reliance upon this Court's holding in *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 931 (1997) misplaced. *Wells* involved a prosecution for making false statements to a federally insured bank in violation of 18 U.S.C. § 1014. The issue turned upon whether materiality of the statement must be proven. The statute did not require that materiality be pleaded or proven (*see Wells*, at 927). Accordingly, the citation of *Wells* for the proposition that the rule of lenity is irrelevant is misplaced. In *Bryan* the issue to be resolved is the meaning of *willfully* – a statutorily enumerated mental state.

Thus, the jury could not possibly have known that it was required to find that Petitioner had a "general knowledge that his conduct was unlawful" (Gov. Br. at 11) where such a standard, whatever else it does mean, does not include:

(1) his knowledge of licensure;

(2) his knowledge that a law was being broken.

When a Court reviews the instruction given to juries, it is important to bear in mind:

> Though some may say, quite properly, that subtle nuances in a Judge's charge fall on deaf ears, there is no assurance that this is so. The juror's difficult task of probing the mind and will of another is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the Court.

(*United States v. Bright*, 517 F.2d 584, 587 (2d Cir. 1975) per Gurfein, J.)

The Government advances *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) for the unremarkable proposition that jury charges are not be viewed out of context, but rather, as a whole. Beyond the fact that *Estelle* came up on habeas review of a California State Court murder conviction, the jury charge there related to the proper use of proof of uncharged prior injuries to McGuire's infant daughter, and not to an element of the offense. Thus, potential constitutionally implicated error cognizable on habeas review, and not compliance with the statutory dictates of an act of Congress, was involved in the review of the jury charge.

Moreover, as the Court in *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) and its progeny (*Francis v. Franklin*, 471 U.S. 307 (1985)) made clear, jury charges are reviewed with a careful eye and a firm recognition of how a "reasonable juror" could have interpreted the instructions, and not a gathering of Law Review luminaries.

Thus, as in *Francis v. Franklin*, *supra*, pp. 321-322, where contradictory or confusing instructions are as here

juxtaposed together, the use of charging language that does little more than hint at, or flatly contradicts the proper standard, will not save the charge from a finding of harmful error. Mere hope or speculation that the jury stumbled or fumbled its way to the correct result will not suffice where the rule of law is deemed to apply.

In *United States v. Rogers*, 18 F.3d 265, 267 (4th Cir. 1994), the Court overturned defendant's conviction for violating 31 U.S.C. § 5322(a), relying upon this Court's ruling in *Ratzlaf* requiring that the jury be properly instructed that "willfully" meant actual knowledge by defendant that his structuring conduct was unlawful. Thus, just as this Court reversed *Ratzlaf's* conviction, so too did the Fourth Circuit in *Rogers* (*accord United States v. Oreira*, 29 F.3d 185, 187 (5th Cir. 1994)).

Mindful that an erroneous burden of proof instruction is not subject to harmless error analysis (*Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)) reversal is required because the jury charge permitted a conviction upon constitutionally deficient proof (*In re Winship*, 397 U.S. 358 (1970)) even under the Government's own retro-fitted *mens rea* standard (*see Rewis v. United States*, 401 U.S. 808, 814 (1971); *Chiarella v. United States*, 445 U.S. 222, 235-236 (1980)). A fair respect for due process of law and the process of our jury system, compels vacatur of the conviction, and a new trial on a fair charge (*McCormick v. United States*, 500 U.S. 257, 274-75 (1991)).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED TO THE COURT OF APPEALS WITH DIRECTION TO VACATE THE CONVICTION OR ORDER A NEW TRIAL.

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Respectfully submitted,

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